2021 INDIANA INSURANCE LAW – A YEAR IN REVIEW

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INTRODUCTION

This Article attempts to capture the more significant cases that were handed down by courts addressing Indiana insurance law in 2021. The Article is not exhaustive, and there may be some cases that are not reported. The ones reported in this Article are considered to be cases of general interest to general practitioners.

I. COVID-19 COVERAGE LITIGATION

Coverage litigation for business interruption losses due to nationwide shutdowns as a result of the COVID-19 pandemic erupted throughout 2020, as businesses spanning all industries turned to their commercial property coverage to cover business losses during the pandemic. Carriers reviewing their business interruption coverage began largely denying claims on the ground that business income and interruption coverage is triggered only by "direct physical loss or damage to property."[1] In the past year, over 2,000 lawsuits have been filed in state and federal courts across the country, and courts in various jurisdictions have issued over 500 decisions on motions to dismiss and summary judgment addressing some of these claims.[2]

In Indiana, there have been just around 18 lawsuits pertaining to COVID-19 business interruption claims filed in state and federal court. Thus far, three substantive decisions have been rendered on dispositive motions in these cases: (1) *Indiana Repertory Theatre Inc. v. Cincinnati Casualty Co.*;[3] (2) *Circle Block Partners, LLC, et al. v. Fireman's Fund Insurance Co.*;[4] and (3) *Georgetown Dental, LLC, v. Cincinnati Casualty Co.*[5]

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1. Other terms, conditions, limitations, and exclusions have been referenced in connection with denials of business interruption claims for COVID-19 losses, including the application of virus exclusions that exist in some policies. In the course of coverage litigation across the country, though, and the decisions that have been issued, by and large the central issue of litigation has been whether the business interruption was due to "direct physical loss or damage" at the property.

2. For comprehensive information and statistics regarding COVID-19 litigation across the country, the University of Pennsylvania Carey Law School has developed a Covid Coverage Litigation Tracker website, which provides excellent analytics of nationwide Covid Coverage Litigation. This website can be accessed at https://cclt.law.upenn.edu/.

3. No. 49-D01-2004-PL-013137, 2020 WL 12604823 (Ind. Super. Ct. Mar. 12, 2021).

4. No. 1:20-CV-02512, 2021 WL 3187521 (S.D. Ind. July, 2021).

5. No. 1:21-cv-00383, 2021 WL 3187521 (S.D. Ind. July, 2021).

A. Indiana Repertory Theatre v. Cincinnati Casualty*: Summary Judgement for Insurer Where No Evidence of Direct Physical Loss Due to COVID-19 on Premises*

There have been two substantive decisions on summary judgment at the trial court level to date. On the first round of summary judgment, the Indiana Repertory Theatre ("IRT") argued that the theatre's loss of use of the theatre due to the COVID-19 pandemic satisfied the policy's "direct physical loss or damage" requirement.[6] In the alternative, IRT argued that if evidence of the virus' presence on the premises was required to demonstrate "direct physical loss or damage," then further discovery was necessary.[7] In response, Cincinnati Casualty Company ("Cincinnati") argued that IRT could not demonstrate "direct physical loss or damage" to the premises, because the IRT's claims related to closures due to state and local shutdown orders were not due to "direct physical loss or damage," as there was no physical alteration to the property.[8] Further, Cincinnati argued that even if the Court found that "loss of use" of the premises constituted "direct physical loss or damage," certain policy exclusions for Ordinance or Law, Delay or Loss of Use, and Acts or Decisions applied to bar coverage for the IRT's claims.[9]

The parties' presented competing proposed interpretations of "physical loss" and presented the Court with various COVID-19 decisions from around the country addressing the meaning and interpretation of "physical loss" in connection with COVID-19 claims.[10] The Court found that the weight of the case law finding that COVID-19 business interruption claims did not demonstrate "direct physical loss or damage" established a majority view and aligned with Indiana principles of insurance law and policy interpretation. The Court went on to hold as follows:

> The Court finds that when read together and in context, the Policy's requirement of direct physical loss or damage to property is not ambiguous. The Court points out that IRT must demonstrate that its insured property underwent some type of direct and physical loss or damage. Here, IRT has asserted that it lost the use of its theatre for its intended purpose. The inquiry is whether this loss of use is a direct physical loss to property. The Court finds that it is not. IRT's loss of use does not have any physical impact on its property. No evidence suggests that the theatre was physically different on March 23, 2020 when IRT announced "the IRT is closed due to the State of Indiana's COVID-19 orders." (Cincinnati, Ex. Cat 1). To properly construe the Policy, the Court must give effect to the "physical" requirement, which is also

6. *Ind. Repertory Theatre*, 2020 WL 12604823, at *13.
7. *Id.*
8. *Id.*
9. *Id.* at 14.
10. *Id.* at 15-17.

> consistent with the law of Indiana and other jurisdictions that have dealt with this issue. If loss of use alone qualified as direct physical loss to property, then the term "physical" would have no meaning. The Court cannot interpret the Policy in a way that nullifies one of its terms . . . [t]he Court finds that the Policy requires physical alteration to the premises to trigger the business income coverage.[11]

In so reasoning, the Court denied IRT's motion for partial summary judgment, and granted Cincinnati's cross-motion for summary judgment.[12] The Court then granted IRT additional time to obtain evidence regarding the presence of COVID-19 on the premises and that if such evidence demonstrates that the "virus caused physical alteration or was at least was capable of doing so," IRT could submit further evidence via a motion with the Court.[13] This decision is currently before the Indiana Court of Appeals. The matter has been fully briefed, with various entities submitting amicus briefs. Oral argument was held on November 19, 2021, before a Court of Appeals panel consisting of Judge Melissa S. May, Judge Patricia A. Riley, and Judge Leanna K. Weissmann. A decision on this appeal remains pending as of December 30, 2021.

As noted above, in the trial court's initial order on summary judgment, the court was reserved judgment on the issue of whether the policyholder could present evidence of "physical loss or damage" that would trigger the business income coverage.[14] Specifically, in the trial court's first order on summary judgment, the court stated "that the Policy requires physical alteration to the premises to trigger the business income coverage."[15] The court further noted that the "IRT should have the opportunity to demonstrate the presence of the virus at the theater and that the virus caused physical alteration or was at least capable of doing so."[16] Accordingly, the Court granted additional time to IRT to obtain that evidence.[17] The court based this holding on the IRT's complaint allegations that "the Coronavirus could attach to surfaces and later infect people," as well as expert affidavits submitted by the IRT.[18]

IRT filed a second motion for summary judgment on the issue of whether it could present evidence of the existence of the coronavirus at the theater and that the virus caused "physical alteration," and Cincinnati filed a cross-motion for summary judgment refuting this same issue. By order dated December 13, 2021, the trial court denied IRT's second motion for summary judgment and granted Cincinnati's cross-motion, holding that, as a matter of law, the evidence did not demonstrate that the presence of the virus on the premises, if any, caused physical

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11. *Id.* at 25 (citations omitted).
12. *Id.* at 28.
13. *Id.*
14. *Id.* at 23.
15. *Id.* at 25
16. *Id.* at 27.
17. *Id.*
18. *Id.*

alteration triggering coverage.

Turning to her substantive rulings, the trial court reiterated that what IRT must prove in order to establish to recovery under Cincinnati's Business Income Form, and that "[t]he Court will now determine whether IRT has met its burden." First, the court concluded under Indiana's (unique) summary judgment principles, statistical modeling can create genuine issues of material fact and ". . . that there is at least a genuine dispute of material fact about whether the SARS-CoV-2 virus was present at the theatre starting in March 2020." However, based on the expert evidence submitted by the parties, the court ruled "that the virus can be removed by cleaning or dies in time [therefore] *the virus does not cause physical alteration as a matter of law*." (emphasis added)

Next, the court determined that IRT's "evidence creates no genuine issue of material fact that the presence of SARS-CoV-2 physically alters the structure or the air around it." The court further found "there is no disputed material facts as to whether the virus is capable of causing physical or structural alteration to surfaces." The court further rejected as moot IRT's argument that the virus contaminated its theater or that it was uninhabitable as being contrary to her prior summary judgment ruling 'that physical alteration to the premises is required. Lastly, the court also granted cross summary judgment on Cincinnati's policy exclusions "because there has been no direct physical loss (to IRT's property) as a matter of law. The trial court's December 13, 2021, Order was entered as a final judgment on December 20, 2021, and on December 22, 2021, IRT filed a notice of appeal.

The Court of Appeals' decisions on these two motions will undoubtedly set Indiana precedent on not only coverage issues relating to business interruption coverage for COVID-19 claims, but on broader issues of what is required to prove "direct physical loss or damage" under Indiana law.

B. Circle Block Partners, LLC, et al. v. Fireman's Fund Insurance Co. Georgetown Dental, LLC v. Cincinnati Casualty Co.*: Insurer Motion to Dismiss Granted for Business Interruption Claim from COVID-19*

In both *Circle Block* and *Georgetown Dental,* the insurers filed motions to dismiss the policyholder's complaint for COVID-19 business interruption coverage pursuant to FRCP 12(b)(6).[19] In *Circle Block,* the insured, Circle Block, is the owner and operator of the Conrad Hotel in downtown Indianapolis, which experienced business losses as a result of the COVID-19 pandemic.[20] In *Georgetown Dental*, the insured dental office also sought business income losses due to closures resulting from stay-at-home orders issued by Governor Holcomb, and specifically those Executive Orders calling for dental offices to "cancel or

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19. Circle Block Partners, LLC v. Fireman's Fund Ins. Co., 2021 WL 3187521, *1 (S.D. Ind. July 27, 2021); Georgetown Dental, LLC v. Cincinnati Cas. Co., 2021 WL 1967180, *1 (S.D. Ind. May 17, 2021).

20. *Circle Block*, 2021 WL 3187521, at *1.

postpone elective and non-urgent procedures."[21] In both cases, the insurance carriers denied coverage on the ground that the business income coverages under the respective policies were not triggered by any alleged "direct physical loss" to covered property.[22] Upon filing of the breach of contract/declaratory judgment lawsuits, each of the carriers filed motions to dismiss the complaint pursuant to FRCP 12(b)(6).[23]

In both suits, the insurers, Fireman's Fund and Cincinnati Casualty, argued that "direct physical loss or damage to property" requires "direct destruction or physical alteration of property" or some other "tangible alteration" of the property to fulfill the "direct physical loss requirement."[24] In response, plaintiff in *Circle Block* argued that "direct physical loss" could mean a "quantifiable loss in the property's usefulness or function for normal purposes."[25] Similarly, in *Georgetown Dental*, the insured argued that "the Covid-19 pandemic resulted in a loss of [Georgetown Dental's] ability to use the covered property for the intended purpose of a dental practice," triggering coverage for "direct physical loss" of the property.[26]

Both Judge Hanlon and Judge Pratt relied on insurance policy interpretation standards under Indiana law to reason that "direct physical loss" to property means "actual and demonstrable physical harm," and/or requires "a harmful alteration in the appearance, shape, color, composition, or other material dimension of the property, excluding situations in which an intervening force plays some role."[27] Both Courts cited to Judge Welch's decision in *IRT* as persuasive and instructive authority.[28]

The Court in *Circle Block* noted specifically that the insured's complaint alleged only that it experienced a reduction in revenue due to reservation cancellations, causing the hotel to suspend its operations because remaining open became "untenable."[29] The Court reasoned that these allegations "attribute the lost revenue to changes in human behavior, not a harmful physical change to the Conrad or the property located within it."[30] As such, the Court held that the "ordinary meaning of the phrase 'direct physical loss or damage to property' does not provide coverage for economic losses caused by the COVID-19 pandemic in the absence of any physical harm to the Conrad's building or the items located within it."[31] Judge Pratt similarly noted in *Georgetown Dental* that the insured's allegations relied solely on loss of use of the premises as a result of closures

21. *Georgetown Dental*, 2021 WL 3187521, at *2.
22. *Id.* at *1.
23. *Id.*
24. *Id.* at *3
25. *Circle Block*, 2021 WL 3187521, at *3.
26. *Georgetown Dental*, 2021 WL 3187521, at *4.
27. *Id.* at *7; *Circle Block*, 2021 WL 3187521, at *4.
28. *Georgetown Dental*, 2021 WL 1967180, at *7; *Circle Block*, 2021 WL 3187521, at *4.
29. *Id.*
30. *Id.*
31. *Id.*

and/or limited accessibility due to Executive Orders issued by the governor.[32] Such closures were not the result of any "actual and demonstrable physical harm," and thus failed to satisfy the policy's requirement of "direct physical loss or damage.[33]

In both cases, the Court dismissed the lawsuits, with prejudice.[34] In *Circle Block,* on August 9, 2021, Circle Block filed a notice of appeal to the Seventh Circuit Court of Appeals. As of December 31, 2021, the issues on appeal had been fully briefed, with multiple amicus briefs submitted on both sides. Oral argument is scheduled to proceed on January 14, 2022. No appeal was filed in *Georgetown Dental.*

II. AUTOMOBILE INSURANCE

A. Auto-Owners Insurance Co. v. Shipley*: Uninsured/Underinsured Motorist Coverage Available for Roadside Technician Changing of a Flat Tire on Customer Vehicle*

Indiana courts, like many other jurisdictions, have historically held that uninsured/underinsured motorist coverage may be available to individuals beyond the provisions of any UM/UIM endorsement, and in particular hold that a person who qualifies for *liability* coverage under an auto policy must also qualify for UM/UIM coverage under that policy. To this end, while most UM/UIM endorsements limit coverage to individuals "occupying" a covered auto, traditional auto liability policies extend coverage to anyone "using" a covered auto. Very often, as in the *Shipley* matter, questions arise as to what activities fall under the umbrella of "using" a covered auto. Here, the Indiana Court of Appeals extended UM/UIM coverage to an individual "using" a covered auto to include a roadside technician who was injured by an underinsured motorist while changing a customer's tire along the road.[35]

In *Auto-Owners Insurance Co. v. Shipley,* a roadside tire repair company sent its employee to help a customer whose car was stuck with a flat tire on the shoulder of an exit off the interstate.[36] After parking his company van in front of the customer's car, the employee opened the side doors on the van, took out an air hose and tire pry bars, and walked to the customer's car.[37] The employee removed the customer's flat fire and rim from the trunk of the car and placed them between his van and the car.[38] As the employee was standing on the rim trying to dismount the flat tire, he was hit by a runaway tire that fell off a passing

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32. *Georgetown Dental,* 2021 WL 1967180, at *2.
33. *Id.* at 7.
34. *Circle Block*, 2021 WL 3187521, at *7; *Georgetown Dental*, 2021 WL 1967180, at *7.
35. Auto-Owners Ins. Co. v. Shipley, 179 N.E.3d 513 (Ind. Ct. App. Dec. 2, 2021).
36. *Id.* at 514.
37. *Id.*
38. *Id.*

truck.[39] At the time, the employee was "about 20 seconds" from going back to his work van to start the air compressor to inflate the new tire.[40] The employee later sued his employer's auto insurer for UIM coverage.[41]

Auto-Owners, the UIM insurer, moved for summary judgment, arguing that the employee was not entitled to UIM coverage because he was not "occupying" or "using" his work van at the time of the accident.[42] The trial court denied the motion, and Auto-Owners obtained an interlocutory appeal of this order to the Indiana Court of Appeals.[43]

On appeal, the Indiana Court of Appeals affirmed the trial court's denial of the insurer's motion for summary judgment and held that the employee was "using" his work van when the accident happened.[44] In doing so, the Court of Appeals relied on two earlier decisions in which it held that a person is "using" a vehicle for insurance purposes if the person has an "active relationship" with the vehicle at the time of the accident.[45] Auto-Owners tried to distinguish *Campos* and *Argonaut* because they involved policies that required only "ownership, maintenance or use" of an auto, while the Auto-Owners policy issued to the roadside tire repair company required the ownership, maintenance, or use of an auto "as an auto."[46] According to the insurer, the employee was not "using" the van "as an auto" because he was not driving or directing its movement.[47] The Court of Appeals disagreed and pointedly stated that the employee "was using his roadside-assistance van as a road-side assistance van—to accomplish the repair necessary to get the customer back on the road."[48]

Relying on its guidance in *Campos* and *Argonaut*, the Court of Appeals found that the employee maintained an active relationship with his van, which was "central" to his work in providing roadside assistance.[49] The employee "parked his van within feet of the customer's car" and "opened the side doors and took out an air hose and tire [pry] bars—items he needed for the job and would have to put back in the van when he was done."[50] When the employee was hit by the runaway

39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 516.
45. *See* Monroe Guar. Ins. Co. v. Campos, 582 N.E.2d 865, 869 (Ind. Ct. App. 1991) (holding that a tow truck driver was "engaged in an activity essential to the towing process" and thus "using" his tow truck when walking toward disabled vehicle "to determine what steps needed to be taken to tow the vehicle"); Argonaut Ins. Co v. Jones, 953 N.E.2d 608, 625 (Ind. Ct. App. 2012) (holding that police officer directing traffic was "using" her patrol car because she "had an active relationship to the patrol car" and "the car was central to her role in controlling traffic at the scene").
46. *Shipley,* 179 N.E.3d at 516.
47. *Id.*
48. *Id.*
49. *Id.* at 515.
50. *Id.*

tire, the Court of Appeals noted, "some of the van doors were still open, and he was only about twenty seconds from going back to the van to turn on an air compressor to inflate the new tire."[51] The Court of Appeals held that these facts established that the employee was "using" the van for purposes of liability coverage.[52] Because that necessarily meant the employee qualified for UM/UIM coverage, the Court of Appeals did not address whether the employee was "occupying" the van for purposes of UM/UIM coverage.[53]

Since the Court of Appeals decided *Campos* and *Argonaut*, the analysis of whether a person was "using" a vehicle has turned on whether the person had an "active" relationship with the vehicle at the time of the accident, and the reasonable expectations of the parties to the insurance policy. Although the Court of Appeals considered those two factors in *Shipley*, its analysis highlights the importance that the latter factor may have in analyzing the former.[54] That is, even though the accident in *Shipley* happened while the employee was dismounting a flat tire from the rim of the customer's car, the insurer should have contemplated that the company's employees would have to park vehicles on the roadside and exit the vehicles to do their work. Thus, practitioners addressing UM/UIM coverage under commercial auto policies should be mindful not only to consider whether the person had an "active" relationship with the vehicle but also whether the circumstances under which the accident occurred were reasonably foreseeable when the insurer issued the policy.

B. Napier v. American Family Mutual Insurance Co.*: Uninsured Motorist Claim Barred by Policy's Two-Year Suit Limitation Provision*

Many automobile policies include a suit limitation period for uninsured and underinsured motorist claims, but there are frequently challenges to the validity and applicability of these limitation provisions, particularly where the statute limitations period for a contractual claim is longer than for a claim in tort. The Indiana Court of Appeals decision in *Napier v. American Family Mutual Insurance Co.,* provided further clarification on how the statute of limitations applies on uninsured and underinsured motorist claims.[55]

In *Napier,* Plaintiff Paula Napier was involved in automobile accidents with operators of uninsured vehicles in 2014 and 2015.[56] More than three years later, in 2019, Napier sued her auto insurer, American Family Insurance Company, seeking uninsured motorist ("UM") benefits for the accidents.[57] American Family filed a motion for summary judgment contending that Napier's lawsuit was time-barred by the following policy language: "*Suit Against Us.* [American Family]

51. *Id.* at 516.
52. *Id.*
53. *Id.* at 515.
54. *See id.* at 514-16.
55. 179 N.E.3d 504 (Ind. Ct. App. 2021).
56. *Id.* at 507.
57. *Id.* at 508.

may not be sued unless all the terms of this policy are complied with . . . [American Family] may not be sued under the Uninsured Motorist coverage on any claim that is barred by the tort statute of limitations.[58] Because Napier's Complaint against American Family was filed beyond Indiana's two-year statute of limitations for personal injury actions,[59] the trial court granted American Family's motion for summary judgment.[60]

On appeal, Napier contended that the American Family policy's reference to "tort statute of limitations" was ambiguous because Indiana has a number of different statutes of limitations that apply to tort claims, depending upon the types of damages that may be involved.[61] The Court of Appeals rejected this argument, finding that the policy's reference to "tort statute of limitations" was "specifically applicable" to UM coverage and thus unambiguously referred to Indiana's two-year statute of limitations for personal injury claims.[62]

The Court of Appeals also rejected Napier's argument that the policy's attempt to limit the filing of claims against the UM insurer to two years was against the public policy behind Indiana's UM statute.[63] Because American Family's policy allowed Napier the same amount of time to bring a UM claim against American Family as she had to bring against the UM tortfeasors, the Court of Appeals concluded that the policy's two-year limitations period was not against public policy.[64]

C. Progressive Southeastern Insurance Co. v. B&T Bulk, LLC[65] – *MCS-90 Endorsement Applies to Intrastate Motor Carrier Travel*

Interpretation and application of an MCS-90 Endorsement is an ever-evolving line of judicial decisions. In this case, the Indiana Court of Appeals addressed and offered two important rulings. First, the Court determined that the MCS-90 Endorsement, in Indiana, applies to intrastate motor carrier travel.[66] Secondly, the Court also concluded that the MCS-90 Endorsement applies when a truck is empty and on its way to pick up a load.[67]

B&T Bulk was a motor carrier that hauls cement in Indiana and Michigan.[68] It was also a registered interstate motor carrier operating under United States

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58. *Id.*
59. IND. CODE § 34-11-2-4(a) (2021).
60. *Napier*, 179 N.E.3d at 510.
61. *Id.* at 509.
62. *Id.*
63. *Id.* at 510.
64. *Id.*
65. 170 N.E.3d 1125 (Ind. Ct. App. 2021), *vacated* Progressive Southeastern Ins. Co. v. Brown, 182 N.E.3d 197 (Ind. 2022).
66. *Id.* at 1132.
67. *Id.* at 1134.
68. *Id.* at 1128.

DOT regulations.[69] It possessed a commercial automobile liability policy with Progressive Southeastern that included an MCS-90 Endorsement. This endorsement is required by the Federal Motor Carrier Act of 1980 to be part of an insurance policy for motor carriers operating under US DOT regulations. The purpose of an MCS-90 Endorsement is to ensure that "motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways."[70]

The B&T driver was involved in an accident with another vehicle resulting in the death of the other vehicle's driver.[71] The B&T driver was on his way to pick up cargo that would be hauled intrastate (only within Indiana).[72] When a liability claim was presented by the driver's estate, B&T submitted it to Progressive Southeastern.[73] Even though the B&T truck was not listed on the Progressive policy, if the MCS-90 Endorsement applies, coverage to the statutory limits would still be found to exist by operation of the endorsement.[74]

Progressive contended that the MCS-90 Endorsement did not apply because under the express application of the endorsement, it only applies to interstate (between two states) travel.[75] The trial court granted summary judgment and determined that the MCS-90 Endorsement applied even though the B&T driver was on an intrastate trip.[76]

On appeal, the appellate court noted that there is a split of authority around the country as to whether an MCS-90 Endorsement applies to intrastate travel accidents.[77] The Indiana court noted that most courts, including federal circuits, have held that it does not apply to purely intrastate travel accidents.[78] However, the estate argued that Indiana's general assembly has enacted legislation that requires the minimum levels of insurance coverage provided by an MCS-90 Endorsement to apply to intrastate travel. Specifically, the estate referred to an Indiana Code section that provides "49 CFR parts 40, 375, 380, 382-387 [this section includes the minimum financial responsibilities of an MCS-90] . . . are incorporated into Indiana law by reference and . . . **must be complied with by an interstate and intrastate motor carrier for persons or property throughout Indiana**."[79]

As a result, and despite the federal provisions saying that it only applies to interstate travel, because the Indiana General Assembly has made it apply to intrastate travel, the court enforced the Indiana statutory requirement and held

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69. *Id.*
70. *Id.* (quoting 49 C.F.R. §387.1).
71. *Id.* at 1129.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 1130.
78. *Id.*
79. IND. CODE § 8-2.1-24-18(a) (2021) (emphasis added).

that the MCS-90 Endorsement applied equally to intrastate travel.[80]

The second issue addressed was Progressive's contention that the MCS-90 Endorsement did not apply because B&T was not transporting property at the time of the accident.[81] Progressive relied upon the definition of "transportation" within the federal regulations concerning the MCS-90 Endorsement which says that it only applied when a motor carrier is involved in "services related to that movement, including arranging for, receipt, [and] delivery. . . of passengers and property."[82] Progressive argued that because B&T was not transporting property at the time of the accident, the MCS-90 Endorsement did not apply.[83]

In affirming the trial court's decision that the MCS-90 Endorsement applied, the court found that a truck driver's travel to a site to pick up a load, even though it was empty at the time, constituted a "service related to" the transportation of property to meet the requirements necessary for the MCS-90 Endorsement to apply.[84]

Readers should note, however, that during the process of publishing this Article, Progressive Southeastern Ins. Co. v. B&T Bulk, LLC was vacated by the Indiana Supreme Court in *Progressive Southeastern Insurance Co. v. Brown*.[85] As the Indiana Supreme Court's opinion is outside of this Survey Period, future Issues will discuss the implications of the decision.

D. Gladstone v. West Bend Mutual Insurance Co.[86] – *UIM Insurer Entitled to Introduce Plaintiff Medical Bills at Trial*

Plaintiffs' attorneys, defense attorneys, and insurers have long quarreled about the admissibility of evidence for measuring medical damages in personal injury actions. Before the Indiana Supreme Court's decisions in *Stanley v. Walker*[87] and *Patchett v. Lee*,[88] the dispute usually centered on whether the jury should consider the amount charged by the medical providers or the amount actually paid to the medical providers in full satisfaction of those bills. Since the Indiana appellate courts have held that juries can consider both amounts, an increasingly common dispute has been whether medical bills should be admitted into evidence at all. In a case of first impression, the Court of Appeals held that medical bills are relevant and admissible, even if the plaintiff is not seeking any recovery for those bills.[89]

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80. *Progressive Southeastern Ins. Co*., 170 N.E. 3d at 1132.

81. *Id.*

82. *Id.* at 1132-1133; *see also* 49 U.S.C. § 13102(23).

83. *Id.* at 1132-1133.

84. *Id.* at 1134.

85. 182 N.E.3d 197 (Ind. 2022)

86. Gladstone v. West Bend Mut. Ins. Co., 166 N.E.3d 362 (Ind. Ct. App., Mar. 24, 2021), *trans. denied,* 171 N.E.3d 609 (Ind. June 24, 2021).

87. 906 N.E.2d 852 (Ind. 2009)

88. 60 N.E.3d 1025 (Ind. 2016).

89. *Gladstone.*, 166 N.E.3d at 368-69.

In *Gladstone v. West Bend Mutual Insurance Co.*, the insured was involved in a car accident and sustained a broken right wrist, a laceration to his right forearm, and a contusion to his right knee.[90] The insured asserted a negligence claim against the other motorist, who was dismissed from the case after her auto insurer tendered its liability limit of $50,000.[91] The insured continued the case against his insurer to recover underinsured motorist ("UIM") coverage, which had an available limit of $200,000.[92]

Before trial, the insured moved to exclude evidence of his medical bills, arguing they were irrelevant because he sought only to recover damages for his pain and suffering.[93] The trial court denied the insured's motion, so his insurer was allowed to present evidence of his medical bills, which totaled about $14,000 and were reduced by insurance payments and discounts to about $2,000.[94] The jury entered a verdict of $0 for the insured, who appealed and argued that the trial court abused its discretion in admitting his medical expenses into evidence.[95]

The Court of Appeals disagreed with the insured and affirmed the trial court's decision.[96] Rejecting the insured's invitation to adopt a bright-line rule that medical bills are "never" relevant to the jury's assessment of pain and suffering damages, the Court of Appeals stated, "[c]ommon sense and experience dictate that a more serious injury generally brings with it greater medical expenses as well as greater pain and suffering."[97]

The Court of Appeals found support for its position in other jurisdictions, which noted that attorneys and insurers "routinely" consider medical expenses in negotiating settlements and that appellate courts do the same when determining whether the non-economic portion of an award of damages is appropriate.[98] "If the bills are low, as [the insured] apparently considers them to be," the Court of Appeals explained, "then they tend to establish that [the insured] has not experienced extensive pain and suffering from his injuries, and that is all that Evidence Rule 401 requires."[99] Because the insurer cleared the "low bar" for establishing that the insured's medical bills were relevant, the Court of Appeals found that the trial court did not abuse its discretion in admitting those bills and the paid amounts into evidence.[100]

The Court of Appeals also rejected the insured's argument that the evidence of his medical bills caused the jury to improperly conclude from the relatively

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90. *Id.* at 365-66.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 367.
95. *Id.*
96. *Id.* at 365.
97. *Id.* at 368.
98. *Id.* at 368 (citing Chapman v. Mazda Motor of Am., Inc., 7 F. Supp. 2d 1123, 1125 (D. Mont. 1998); Martin v. Soblotney, 502 Pa. 418, 466 A.2d 1002, 1027 (1983)).
99. *Id.* at 369.
100. *Id.* at 368-69.

low amounts billed that he had experienced minimal pain and suffering.[101] The insured presented evidence to dispute that his medical bills were an accurate reflection of his pain and suffering. "While the jury may have not credited this evidence," the Court of Appeals found that the insured had "not established any danger that the jury was unable to grasp [his] theory of the case or that its verdict was the result of confusion."[102] Thus, the Court of Appeals found that the trial court did not abuse its discretion in admitting evidence of the insured's medical expenses, even though he sought damages only for his alleged pain and suffering.[103]

E. Cincinnati Insurance Co. v. Selective Insurance Co[104] – *Certification to IN Supreme Court Question re: Cause of Action for Insurer's Negligent Refusal to Settle [SETTLED AND VOLUNTARILY DISMISSED]*[105]

This insurer-to-insurer coverage dispute arose out of an underlying, single-car auto accident that occurred in 2015, and a convoluted series of lawsuits followed.[106] The driver, Jeff Smiley, was driving a truck owned by his auto repair shop, Smiley Body Shop, with passenger Greg Callahan.[107] The truck flipped, causing passenger Callahan to sustain permanent debilitating injuries.[108] Selective had issued a commercial auto policy to Smiley and the auto repair shop; Cincinnati issued a personal auto policy to Smiley, with $1 million umbrella coverage.[109] Three lawsuits followed: (1) the personal injury action by Callahan against Smiley and the auto repair shop; (2) a declaratory judgment action against Smiley, seeking a determination whether Selective and/or Cincinnati covered Callahan's claim (the "DJ Action"); and (3) this action, wherein Cincinnati sued Selective for bad faith failure to settle and negligent refusal to settle.[110]

The procedural history of each of the first two lawsuits is relevant to understanding the basis of the third lawsuit from which this decision arose. After the underlying personal injury action was filed, both Selective and Cincinnati contested coverage on the ground that (1) Callahan was an employee of the auto repair shop; and (2) Cincinnati's policy exclusion for "bodily injury…arising out of a 'business' or 'business property.'"[111] Selective defended Smiley and the shop subject to a reservation of rights, and Callahan made an early $3 million

101. *Id.* at 369.
102. *Id.*
103. *Id.* at 370.
104. No. 1:18-cv-00956-JPH-DLP, 2020 WL 7027876 (S.D.Ind. Nov. 30, 2020).
105. No. 1:18-cv-00956-JPH-DLP, 2021 WL 766651 (S.D. Ind. Feb. 25, 2021).
106. *Cincinnati Ins. Co.*, 2020 WL 7027876 at *1-2.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at *2.

settlement demand, which was the limits of the Selective policy.[112] Cincinnati sent a letter to Selective demanding that Selective "take immediate steps to promptly settle the Callahan litigation within the available insurance coverage provided by Selective."[113] Settlement negotiations continued, with Callahan making a demand below Selective's policy limits, but Selective believed the coverage issue was viable and offered $150,000 in response.[114]

The coverage issues in the DJ Action went before Chief Judge Magnus-Stinson, who denied summary judgment for the insurers, holding that "whether an individual is an employee is a question for the trier of fact," and the record contained genuine issues of fact as to Callahan's employment status.[115] Cincinnati settled with Callahan separately for $600,000. Selective took the coverage question in the DJ Action to a jury, which found that Callahan was <u>not</u> an employee, and Selective subsequently settled with Callahan for $2,996,532.41.[116]

In Cincinnati's suit against Selective, the insurer's each moved for summary judgment on Cincinnati's bad faith and negligent failure to settle claims.[117] On the bad faith refusal to settle, the Court granted summary judgment in Selective's favor, holding that Selective had a rational basis for contesting coverage based upon Callahan's employee status, and that its decision not to settle until the coverage issue was worked out was appropriate.[118] The Court also rejected Cincinnati's argument that Selective should have settled within policy limits "sooner," as there is no case law holding that "an insurer's duty to act in good faith requires it to settle a case before an excess insurer does so."[119]

By order dated February 25, 2021, the Southern District of Indiana certified two questions for the Indiana Supreme Court:

1. Does Indiana law recognize a cause of action against an insurance company for the negligent failure to settle a claim within policy limits?
2. Does Indiana law recognize the doctrine of equitable subrogation, thus permitting an excess insurance carrier to directly sue a primary carrier for the negligent and/or bad faith failure to settle a claim within policy limits?[120]

The Court reasoned that these issues on certified questions were outcome determinative to the case, and that they involved important issues of Indiana law

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112. *Id.* at *2-3.
113. *Id.* at *2.
114. *Id.* at *3.
115. *Id.*
116. *Id.* at 4.
117. *Id.*
118. *Id.* at 5.
119. *Id.*
120. Cincinnati Ins. Co. v. Selective Ins. Co, No. 1:18-cv-00956, 2021 WL 766651 at *1 (S.D. Ind. Feb. 25, 2021).

and public concern that were likely to occur.[121] The Court noted that other Indiana state and federal decisions had addressed similar issues, the Indiana Supreme Court had not yet been faced with the question whether a cause of action for negligent failure to settle a claim exists.[122] The Court acknowledged that the leading "Indiana" case law on point is the Seventh Circuit Court of Appeals decision in *Certain Underwriters of Lloyd's and Companies Subscribing to Excess Aviation Liability Insurance Policy No. FL-10959 A&B v. General Accident Insurance Co. of America*,[123] which held that Indiana law would permit an excess insurer to sue a primary insurer on the basis of equitable subrogation for bad faith or negligent refusal to settle within primary limits.[124] The Court stated that the Indiana Supreme Court has never disavowed this decision, and thus it remains binding precedence on the Southern District of Indiana.[125] As such, the Court found that good cause existed to certify these questions to the Indiana Supreme Court.[126]

On March 18, 2021, the insurers filed a joint notice of settlement, and that the certified questions to the Indiana Supreme Court were moot.[127] The case was dismissed and closed before these questions reached the Indiana Supreme Court.[128] What this case highlights, though, is a significant gap in Indiana law on two substantive areas of insurance coverage. Questions regarding these two particular topics arise often in coverage litigation, and it would not surprise this author if these issues are eventually addressed and resolved by the Indiana Supreme Court in the foreseeable future.

III. COMMERCIAL INSURANCE

A. Ebert v. Illinois Casualty Co.[129] – *Duty to Defend under General Liability Policy issued to Bar for Intoxicated Patron involved in Auto Accident*

Illinois Casualty provided both general liability and liquor liability insurance policies to two bars, Little Daddy's and Big Daddy's.[130] A patron consumed alcohol at Big Daddy's and became intoxicated.[131] Big Daddy's was using a

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121. *Id.* at *1.

122. *Id.* at *1-2.

123. 909 F.2d 228 (7th Cir. 1990).

124. *See Cincinnati Ins. Co.*, 2021 WL 766651 at *2 (describing the holding of Certain Underwriters v. General Acc. Ins. Co., 909 F.2d 228 (7th Cir. 1990)).

125. *Id.*

126. *Id.*

127. See Order, Cincinnati Ins. Co. v. Selective Ins. Co. of America, 21S-CQ-96 (S.D. Ind. Apr. 23, 2021).

128. *Id.*

129. 177 N.E.3d 435 (Ind. Ct. App. 2021), *vacated*, Parks v. Illinois Cas. Co., 180 N.E.3d 928 (Ind. 2022).

130. *Id.* at 438.

131. *Id.*

bouncer who was an employee of Little Daddy's, which was closed.[132] After the patron became intoxicated, he was ordered to leave by the bouncer.[133] The patron left Big Daddy's, and shortly after departing, was involved in an auto accident with the Eberts.[134]

The Eberts brought a lawsuit against both bars who tendered the lawsuit to Illinois Casualty.[135] Illinois Casualty filed a declaratory judgment action contending that no coverage was owed under three of the four bar policies.[136] Illinois Casualty agreed that a defense was owed to Big Daddy's under the liquor liability policy which had reduced coverage limits.[137] Illinois Casualty further contended that no coverage was owed under either of the Little Daddy's policies because it was closed and did not serve alcohol.[138] Likewise, Illinois Casualty contended that certain exclusions in both bars' general liability policies for "causing or contributing to the intoxication of any person" barred coverage under those policies.[139] The trial court granted summary judgment to Illinois Casualty finding that it owed neither a defense nor indemnity to the bars under the three policies at issue.[140]

On appeal, the Court of Appeals reversed in part and affirmed in part. The Court affirmed the trial court's conclusion that the insurer owed neither a duty to defend nor to indemnify Little Daddy's under the liquor liability policy, as it was closed and did not furnish alcohol to the patron.[141] However, the Court reversed the trial court's summary judgment finding as to the applicability of both general liability policies.[142]

The Court first addressed whether a duty to defend was owed. While the Court concluded that the Eberts' claims for dram shop liability against the bars were excluded, the Court found that some of the Eberts' claims were independent of the alcohol claims and were sufficient to trigger a duty to defend.[143] The Court stated that "[t]hough all of the Eberts' claims *relate factually* to [the patron's] intoxication, some of them do not *legally rely* on the bar causing or contributing to that intoxication."[144] Thus, these claims were sufficient to require Illinois Casualty to defend the bars under the business policies.

The Court also addressed the trial court's ruling that Illinois Casualty owed

132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 441.
140. *Id.* at 442.
141. *Id.* at 443 n.7.
142. *Id.* at 446-47.
143. *Id.* at 445-47.
144. *Id.* at 447.

no duty to indemnify under the general liability policies.[145] In reversing the trial court's summary judgment, the Court dismissed Illinois Casualty's request that the Court determine it lacked a duty to indemnify by concluding such a claim was premature and unripe:

> While the source of the duty to indemnify is also the contract, the duty to indemnify does not attach until a later triggering event: the suffering of some loss by the insured. It may be the case that Illinois Casualty will not owe a duty to indemnify the businesses for every claim. But the bars have not yet suffered a loss. The duty to indemnify has not been triggered. Accordingly, questions regarding indemnity are unripe, and therefore, premature.[146]

The Court then stated that the determination of whether a duty to indemnify is owed "must first be pursued to some end result."[147]

Readers should note, however, that during the process of publishing this Article, this opinion was vacated by the Indiana Supreme Court in *Parks v. Illinois Casualty Co*.[148] As the *Parks* opinion is outside of this Survey Period, future Issues will discuss the implications of this decision.

B. Roadsafe Holdings, Inc. v. Walsh Construction Co.[149] – *Award of Defense Costs Against Subcontractor Expands to Pursuing Declaratory Judgment Action*

This case has a long appellate history involving a number of legal issues. After a driver was injured while operating his vehicle through a construction zone, he filed a lawsuit against Walsh Construction Company ("Walsh") for allegedly creating an unsafe traffic pattern.[150] Walsh filed a third-party complaint against a subcontractor, Roadsafe, claiming that Roadsafe breached its subcontract with Walsh in failing to indemnify or provide insurance coverage to Walsh for the accident.[151]

After Walsh tendered the matter to Roadsafe, Walsh also notified Roadsafe's insurer, Zurich, and requested that Zurich defend Walsh in the lawsuit.[152] Walsh filed a separate declaratory judgment action against Zurich contending that it owed a duty to indemnify Walsh.[153] The trial court eventually entered summary judgment for Zurich, finding that Zurich had no contractual obligation to cover Walsh as an additional insured primarily because there was a large self-insured

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145. *Id.*
146. *Id.* at 448.
147. *Id.*
148. 180 N.E.3d 928 (Ind. 2022).
149. 164 N.E.3d 726 (Ind. Ct. App. 2021).
150. *Id.* at 728.
151. *Id.*
152. *Id.* at 729.
153. *Id.* at 730.

retention ("SIR") endorsement that obligated Roadside to pay before Zurich's policy was triggered. [154]

Walsh proceeded to defend and eventually settled the driver's lawsuit against it for $60,000.[155] Walsh then moved for summary judgment in its lawsuit against Roadsafe by contending that Roadsafe was liable for the settlement with the driver as well as Walsh's attorney fees in litigating both the driver's lawsuit as well as its pursuit of the declaratory judgment action against Zurich.[156] The trial court granted summary judgment to Walsh, and after a damages hearing, ordered Roadsafe to pay the following:

- The $60,000 settlement;
- Walsh's defense costs for the driver's lawsuit in the amount of $201,603.80;
- Walsh's fees and costs for pursuit of the declaratory judgment action in the amount of $28,240.96; and
- Pre-judgment interest in the amount of $134,169.43.[157]

Roadsafe appealed the grant of summary judgment by raising a number of issues.[158] With respect to the Court's determination that Walsh was entitled to indemnity, Roadsafe contended that it lacked a duty to indemnify Walsh until and unless there had been an adjudication that Roadsafe was negligent in causing the driver's injuries.[159] Roadsafe further contended that the language did not obligate it to indemnify Walsh for Walsh's own negligence.[160] The Court of Appeals rejected this argument based on Roadsafe's concession that it had a duty to defend Walsh in the driver's lawsuit.[161] Because Roadsafe denied the indemnity request, Walsh was free to settle the lawsuit without any Roadsafe objection to it.[162]

The Court also suggested that once Roadsafe knew of the indemnity demand, Roadsafe had an obligation to avoid being collaterally estopped with respect to the settlement by either providing a defense under a reservation of rights or filing a separate declaratory judgment action to ask a court for a judicial declaration of its rights under the SIR to its policy.[163] However, Walsh filed a third-party complaint against Roadsafe, so presumably the issues about Roadsafe's responsibility were already part of a legal proceeding, and the Court does not address this issue. It does not make sense for the Court to suggest that Roadsafe had to file a separate declaratory judgment action to avoid the effect of collateral estoppel when it was already involved in litigation relating to that issue with

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154. *Id.*; *see also* Walsh Const. Co. v. Zurich Am. Ins. Co., 72 N.E.3d 957 (Ind. Ct. App. 2017).
155. *Roadsafe Holdings, Inc.*, 164 N.E.3d at 730.
156. *Id.*
157. *Id.* at 730-31.
158. *Id.* at 728.
159. *Id.* at 731-32.
160. *Id.* at 732.
161. *Id.* at 732-33.
162. *Id.* at 733.
163. *Id.* at 732-33.

Walsh.

The Court also concluded that Roadsafe was responsible for Walsh's entire defense costs in defending against the driver's suit, even for those defense costs incurred before it filed its third-party complaint against Roadsafe.[164] Likewise, the Court found that Walsh was also entitled to its attorney fees for prosecuting the claim for indemnification.[165] Finally, the Court also found that Roadsafe was responsible for Walsh's attorney fees incurred in pursuing the declaratory judgment action against Zurich, as such costs were also part of "prosecuting the indemnity claim."[166]

This case, while not technically an insurance matter, addresses issues that frequently arise in indemnity/insurance matters. Thus, the authors felt that it is a significant case that practitioners may wish to review when confronted with similar types of claims.

C. G&G Oil Co. of Indiana v. Continental Western Insurance Co.[167] – *The Availability of Liability Insurance for a Ransomware Attack*

An oil company was a victim of a form of cyber extortion known as ransomware.[168] The hacker infiltrated the company's computer network, encrypted its server, and password protected its drives.[169] The hacker then demanded a ransom of bitcoins in return for the passwords needed to decrypt the company's computers and regain access.[170] The company complied and spent $35,000 for four bitcoins to pay to the hacker.

The company's Commercial Crime policy included a "Computer Fraud" provision that covered losses "resulting directly from the use of any computer to fraudulently cause a transfer" of the company's funds.[171] When the case was at the Court of Appeals, the insurer denied coverage and argued that the company's loss was not caused by computer fraud.[172] The insured, however, contended that the plain and ordinary meaning of the word "fraud," which the policy did not define, was not limited to a "knowing misrepresentation or concealment of a material fact."[173] According to G&G Oil, a hijacker's ransomware attack was "deceptive and unconscionable."[174]

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164. *Id.* at 734.
165. *Id.* at 733.
166. *Id.* at 734.
167. 165 N.E.3d 82 (Ind. 2021).
168. *Id.* at 85.
169. *Id.*
170. *Id.*
171. *Id.* at 85.
172. *Id.* at 86.
173. G&G Oil Co. of Ind. v. Cont'l W. Ins. Co., 145 N.E.3d 842, 844 (Ind. Ct. App. 2020), *reh'g denied* (June 4, 2020), *trans. granted*, *opinion vacated*, 157 N.E.3d 527 (Ind. 2020), *and vacated sub nom*. G&G Oil Co. of Indiana v. Cont'l W. Ins. Co., 165 N.E.3d 82 (Ind. 2021).
174. *Id.* at 846.

The Indiana Court of Appeals rejected G&G Oil's broad reading of fraud and found that it was commonly understood as "deception" or a "perversion of truth" which was meant to induce another to surrender a right or part with something of value.[175] In this case, the hacker did not pervert the truth or engage in deception.[176] The hacker simply infiltrated the system and then truthfully made demands for ransom.[177] So while many cyber-attacks involve deceit, some do not. Under the circumstances of this case at the Court of Appeals, the policy did not cover the loss.

The Indiana Supreme Court granted transfer of the matter in October 2020, and on March 18, 2021, the Supreme Court (in a decision authored by Justice David), vacated the Court of Appeals decision, reversed in part and affirmed in part the Court of Appeals decision, and remanded for further proceedings.[178]

In its decision, the Supreme Court was asked to clarify the issue: "Whether the ransomware attack constitutes 'fraudulent' conduct under the terms of the Continental Policy and whether its loss 'result[ed] directly from the use of a computer.'"[179] The Supreme Court held that the phrase "fraudulently cause a transfer" in the policy was unambiguous, but that the lower courts construed the "straightforward definition" too narrowly.[180] Relying on common law and dictionary definitions of the term "fraud," the Supreme Court reasoned that a simple definition of the phrase "fraudulently cause a transfer" means "to obtain by trick."[181] Using this standard, the Supreme Court reasoned that neither G&G Oil nor Continental had submitted sufficient evidence on summary judgment to prove, as a matter of law, that the hacker's infiltration of G&G Oil's computer system was obtained by trick.[182] Further, while the Supreme Court noted that material issues of fact exist concerning the hack's "initiating event," it also acknowledged that "enough is known to raise a reasonable inference the system could have been obtained by trick."[183] However, "if no safeguards were put in place, it is possible a hacker could enter a company's servers unhindered and hold them hostage. There would be no trick there."[184] The Supreme Court therefore held that summary judgment was not appropriate on this issue and remanded the matter to the trial court for further proceedings.[185]

The Supreme Court next examined the second part of the applicable policy language of whether the ransomware attack caused loss resulting "directly from

175. *Id.* at 847.
176. *Id.*
177. *Id.*
178. G&G Oil Co. of Ind. v. Cont'l W. Ins. Co., 165 N.E.3d 82, 85 (Ind. 2021).
179. *Id.* at 87.
180. *Id.* at 87-88.
181. *Id.* at 89.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 91.

the use of a computer."[186] The Supreme Court focused on the definition of the term "directly" in holding that the voluntary transfer of Bitcoin by the insured to the hackers to release the ransomware attack demonstrated a sufficient causal connection between the use of a computer and the loss to constitute a "direct" cause of loss.[187] The court specifically reasoned that the payments were 'voluntary' only in the sense G&G Oil consciously made the payment. To us, however, the payment more closely resembled one made under duress. Under those circumstances, the 'voluntary' payment was not so remote that it broke the causal chain. Therefore, we find that G&G Oil's losses 'resulted directly from the use of a computer.'[188]

On July 22, 2021, G&G Oil filed a motion for summary judgment on the outstanding "fact" issue acknowledged by the Indiana Supreme Court, i.e., whether G&G Oil had safeguards in place, or whether the hackers were able to enter G&G Oil's computer system "unhindered." G&G Oil argued that it had substantial measures and safeguards in place, but that the "spear-phishing" email attack initiated by the hackers to enter the system and introduce the ransomware virus was a form of "trickery" that would satisfy the "fraud" coverage requirements. The parties settled before this issue was further briefed, and the case was dismissed with prejudice on December 14, 2021.

IV. HOMEOWNERS/PERSONAL LINES INSURANCE

A. Hoppe v. Safeco Insurance Co. of Indiana[189] – *No Coverage Under Homeowners Policy for Golf Cart Ride in Nearby Parking Lot That Was Not an "Insured Location"*

In *Hoppe*, a minor was injured after falling from a golf cart driven by her minor friend, the daughter of the insureds, in the parking lot of an outdoor music venue across the street from the insureds' home in Noblesville, Indiana.[190] Through her father, the injured minor sued the insureds and sought damages for their alleged negligence, negligent supervision, negligent entrustment, and failure to obtain timely medical care for the minor.[191]

The insureds sought a defense and indemnification under their homeowner's policy, which generally excluded liability coverage for bodily injury arising out of the use of "motorized land vehicles" owned or operated by any insured.[192] Based on the exclusion, the insurer filed a declaratory judgment action against the insureds and the minor claimant, seeking a declaration it had no duty to defend the insureds or to indemnify them for any judgment they must pay to the minor

186. *Id.* at 90.
187. *Id.*
188. *Id.* at 90-91.
189. 174 N.E.3d 1123 (Ind. Ct. App. 2021).
190. *Id.* at 1126.
191. *Id.*
192. *Id.* at 1127.

claimant.[193] In response, the insureds (and the minor claimant) argued that the exclusion did not apply because it made an exception for certain kinds of motorized land vehicles, including golf carts, while on an "insured location."[194]

The policy defines "insured location" to include "any premises not owned by you which you have the right or privilege to use arising out of [your residence]."[195] According to the insureds, they had the privilege to use the parking lot of the music venue, which at the time of the accident, was named Klipsch Music Center.[196] The insureds argued that their privilege to use the parking lot arose out of its close proximity to their residence, the frequency at which they drove the golf cart to the parking lot, and the fact that they were never told they could not use their golf cart in the parking lot.[197] The trial court rejected the insureds' argument and entered summary judgment for the insurer, holding the policy excluded liability coverage, and thus, the insurer had no duty to defend or indemnify the insureds against the minor claimant's lawsuit.[198]

The Court of Appeals affirmed the trial court's decision and found that the insureds' interpretation of the term "privilege" was unreasonable.[199] The policy did not define the term "privilege," so the Court of Appeals turned to Merriam-Webster's dictionary to give "privilege" its plain and ordinary meaning: "a right or immunity granted as a peculiar benefit, advantage, or favor."[200] The Court of Appeals noted that the definition of privilege "implies it is granted by the property owner with knowledge and acceptance of the use of the property by the person to whom the privilege is bestowed."[201] With this understanding, the Court of Appeals rejected the insureds' argument that the Klipsch parking lot was an insured location.[202] Because the insureds had not been granted the right to use the Klipsch parking lot, they did not have the "privilege" to do so.[203] The Court of Appeals stated, "[i]t is not a reasonable interpretation that just because the [insureds] were never told that they could not use their golf cart in the Klipsch Parking Lot, that they had been granted a privilege to use the Klipsch Parking Lot."[204] As the Court of Appeals put it, the insureds' presence on and use of the Klipsch parking lot "was, at best, unacknowledged, and, at worst, unauthorized by the property owner."[205]

Even if the insureds were granted the "privilege" to use the parking lot, the

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193. *Id.*
194. *Id.* at 1130.
195. *Id.* at 1128.
196. *Id.* at 1126, 1130. The venue is now on its fifth name, "Ruoff Music Center."
197. *Id.* at 1130.
198. *Id.* at 1128.
199. *Id.* at 1132.
200. *Id.* at 1131.
201. *Id.* at 1132.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*

Court of Appeals explained, the parking lot would still not meet the definition of an "insured location" because the "privilege" to use the parking lot did not arise from the insured premises.[206] "Using the parking lot of a business for one's own pleasure simply because it is located near one's home does not prove that any alleged privilege to use the area arises from the residence premises."[207] To hold otherwise, the Court of Appeals explained, would mean that "any frequent use of a nearby parking lot could be shown to be a privilege arising from one's residence premises."[208]

Finally, the Court of Appeals rejected two additional arguments made by the insureds—that the phrase "while on an insured location" was ambiguous as to what had to occur "on an insured location" and that the minor's claim for failure to obtain timely medical treatment involved injuries separate from those caused by the use of the golf cart.[209] Because the policy covered injuries caused by an "occurrence" or accident, the Court of Appeals held that "it is the golf cart's location at the time of such an accident that determines whether coverage applies."[210] And because there could be no claim for failure to obtain timely medical care but for the injuries stemming from the use of the golf cart, that claim was also subject to the exclusion.[211]

The decision in *Hoppe* exemplifies the legal tenet that the failure to define a term in an insurance policy does not make the term ambiguous. Although the Court of Appeals addressed a specific and less common "insured location" provision, its general analysis may still provide insurance practitioners with helpful insight when evaluating more common "insured location" provisions.

V. OTHER INSURANCE ISSUES

A. Brotherhood Mutual Insurance Co. v. Church Mutual Insurance Co.[212] – *Lanham Act Claims Against Insurance Carrier Are Reverse Preempted by McCarron Ferguson Act*

The factual and procedural history of this suit is somewhat long and convoluted, but it resulted in an order on a motion to remand that includes a holding on an issue of first impression in the Seventh Circuit on the viability of Lanham Act claims to be brought against an insurance carrier.[213] In this order, the Northern District of Indiana found that unfair competition claims under the Lanham Act may be reverse preempted by Indiana's state law under the McCarron Ferguson Act, and thus may not be asserted against an insurance

206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 1133.
210. *Id.*
211. *Id.* at 1134.
212. No. 1:21-CV-00007, 2021 WL 3285527 (N.D. Ind. Aug. 2, 2021).
213. *Id.*

carrier.[214]

By way of background, this suit involves a dispute between two competitor insurance carriers, Brotherhood Mutual Insurance Company and Church Mutual Insurance Company, regarding the interpretation and application of an arbitration agreement between the two carriers to address certain agency sales disputes between the companies.[215] These two companies are "direct competitors in a niche insurance market with competing agencies engaging in sales activity intended to sell property/casualty policies within the religious nonprofit organization market."[216] In 2017, the companies entered into a Settlement Agreement arising out of a series of suits involving agency sales and marketing practices filed by Church Mutual against Brotherhood Mutual.[217] The agreement included an alternative dispute resolution process that the companies would utilize to address "agency sales issues" between the companies.[218] The agreement provides that, if the Companies cannot resolve the issue through the outlined process, the parties may pursue either mediation or arbitration.[219] In 2020, Church Mutual notified Brotherhood Mutual of an issue involving certain statements by a Brotherhood Mutual agent regarding public statements concerning liability coverage for COVID-19 claims.[220] As the dispute between the companies evolved, Brotherhood Mutual took the position that Church Mutual's dispute did not involve only agency sales practices but was a direct attack on certain coverage positions taken by Brotherhood Mutual.[221] Brotherhood Mutual refused to respond to certain demands of Church Mutual, and Church Mutual served an arbitration demand on Brotherhood Mutual pursuant to the agreement.

In response, Brotherhood Mutual filed a declaratory judgment action against Church Mutual in the Allen County Superior Court, seeking a declaration regarding the interpretation of the dispute resolution provision in the Agreement as it applied to the direct dispute between them.[222] Church Mutual removed the action to the Northern District of Indiana, asserting that federal question jurisdiction exists because the substantive controversy underlying Church Mutual's arbitration demand presents a Lanham Act claim.[223] Brotherhood Mutual filed a motion to remand, arguing, among other grounds, that Church Mutual's assertion of federal question jurisdiction was baseless because its Lanham Act claims could not be asserted against Brotherhood Mutual because such claims were reverse preempted under the McCarron Ferguson Act.[224]

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214. *Id*. at *6
215. *Id*. at *1.
216. *Id*.
217. *Id*.
218. *Id*.
219. *Id*.
220. *Id*.
221. *Id*.
222. *Id*.
223. *Id*.
224. *Id*. at *3.

The McCarron Ferguson Act "endows states with plenary authority over the regulation of insurance and provides that '[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.'"[225] The "reverse preemption" imposed by the McCarron Ferguson Act, therefore, applies to bar application of any federal law or statute to the "business of insurance" that is otherwise governed by state law.[226] Because the Seventh Circuit had not yet decided the question of whether the McCarron Ferguson Act applied to bar Lanham Act claims, the Northern District Court relied on case law from the District of South Carolina, which held that Lanham Act claims against an insurance carrier were preempted by the McCarron Ferguson Act where state insurance statutes governing unfair claims handling and trade practices.[227]

Relying upon the rationale of these cases, the Northern District Court found that though the Lanham Act does not specifically apply to insurance companies, Indiana in particular has enacted statutes governing unfair competition and deceptive trade practices within its insurance code.[228] Based upon the existence of applicable Indiana statutes governing unfair competition that apply to the "business of insurance," the Court found that Church Mutual's Lanham Act claims would be reverse preempted by Indiana state law, and thus its claim that federal question jurisdiction existed failed.[229] The Court remanded the suit back to the Allen County Superior Court.[230] The parties ultimately settled the substantive issues in this matter, and the case was dismissed with prejudice in October 2021.

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225. *Id.* at *4.

226. *Id.*

227. *Id.* at *5; *see* Colonial Life & Accident Ins. Co. v. Am. Fam. Life Assurance Co. of Columbus, 846 F. Supp. 454 (D.S.C. 1994); Ins. Prod. Mktg., Inc. v. Conseco Life Ins. Co., No. 9:11-cv-01269, 2011 WL 3841269 (D.S.C. Aug. 29, 2011).

228. *Brotherhood Mut. Ins. Co.*, 2021 WL 3285527 at *5.

229. *Id.* at *5-6.

230. *Id.* at *6.